APPENDIX A — SUMMARY ORDER OF THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 14, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-7398

PHILLIS ROBINSON BRANCH,

Plaintiff-Appellant,

- v. -

SONY MUSIC ENTERTAINMENT, INC.,

Defendant-Appellee.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of May two thousand two.

Present: HONORABLE WILFRED FEINBERG,

HONORABLE AMALYA L. KEARSE,

HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by counsel.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Griesa's Opinion dated March 7, 2001. Defendant came forward with evidence of legitimate, non-discriminatory reasons for its employment decisions, and plaintiff failed to adduce evidence from which a rational finder of fact could infer that those reasons were pretext for racial discrimination.

We have considered all of plaintiff's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk
by: s/ Lucille Carr

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 7, 2001 AND RECEIVED MARCH 8, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 9238 (TPG)

PHILLIS ROBINSON BRANCH,

Plaintiff,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Defendant.

OPINION

Plaintiff, Phillis Robinson Branch, sues her former employer, Sony Music Entertainment, Inc., for violation of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e *et seq.* Plaintiff, who is African-American, claims that she was terminated from her position as an executive secretary on account of her race. Defendant denies this claim and argues that plaintiff's termination was part of a larger reorganization motivated by budget constraints.

Defendant moves for summary judgment dismissing the claim. The motion is granted.

Appendix B

Facts

Plaintiff, an African-American woman, was employed by CBS Records, Inc. beginning in May of 1990. In about January of 1991 CBS Records was acquired by defendant Sony Music, Inc. During plaintiff's employment with CBS/ Sony, she worked as a secretary in the Management Information Services (MIS) department, under several different supervisors. In about October of 1994 plaintiff was assigned to work for Vice President Rick Schwartz, who supervised plaintiff's department.

Between 1994 and early 1996 Sony underwent a budget-driven reorganization in plaintiff's area, resulting in many layoffs. During this time, upper management instructed Schwartz to combine into a single position the positions held by plaintiff and two other employees, Carmen Bonet and Esther Martinez. Martinez, a former manager who is Hispanic, was selected to fill the new combined position. Martinez was more senior than plaintiff and Bonet, and had the unequivocal endorsement of her supervisors. On January 24, 1996, Schwartz informed plaintiff that her position was being eliminated.

Plaintiff does not dispute Martinez's seniority or qualifications, but claims that the selection of Martinez was racially motivated. Plaintiff notes that Martinez is a light-skinned Hispanic. She also states that, although Sony's reorganization was intended to save money, Martinez's post-reorganization salary was $7,000 higher than plaintiff's had been. She adds that the additional duties taken on by Martinez as a result of combining the positions did not justify the higher salary.

Appendix B

Plaintiff was offered a termination agreement that would have characterized her layoff as a "voluntary resignation," effective March 29, 1996. Plaintiff was offered the option of working in an internal temp pool while she looked for other employment within Sony and elsewhere. Plaintiff refused to sign the termination agreement. This apparently made her ineligible for assignment to the temp pool. She was then asked to leave immediately. Defendant asserts that plaintiff was asked to leave immediately because she was in a position of confidence with access to Schwartz's personal e-mail and files.

Bonet was offered termination on the same terms as plaintiff. Unlike plaintiff, Bonet signed the termination agreement and accepted employment in the temp pool. She subsequently found other employment at Sony.

In addition to Bonet, at least two other Sony employees, Richard Gricus and Susan Richards, had their positions terminated on the same day plaintiff was asked to leave. Gricus is Caucasian and was an executive at Sony. Richards is also Caucasian and was a manager at Sony. Gricus and Richards were offered the termination agreement, which both signed. Because of their positions, instead of being offered work in the temp pool, they were offered the opportunity to stay through the end of March to provide transition assistance.

On February 13, 1996 plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC). The charge alleged that plaintiff's termination was racially discriminatory, and that she had been subject to discriminatory treatment by Schwartz during her

employment. On September 30, 1997 the EEOC issued plaintiff a "right to sue" letter. Plaintiff filed her complaint in this action on June 29, 1998 alleging racially discriminatory termination.

A question exists as to whether plaintiff's job performance was satisfactory during her employment. Plaintiff states that her Employment Performance Reviews consistently rated her between "competent" and "above expectations." She also notes that she received regular salary increases, on both merit and "marketplace adjustment" bases. Schwartz, however, claims that plaintiff had punctuality problems, made too many personal phone calls, was careless about keeping notes in the calendar and taking phone messages, and didn't review his e-mail in a timely fashion. Plaintiff contests these allegations.

Plaintiff states that other African-American employees were treated differently than white employees in her department. She states that on one occasion, Schwartz refused to approve the time sheets of Tom Wiggins, an African-American consultant in the department. Plaintiff claims that Schwartz did this to make Wiggins' working conditions difficult. She also states that, by the end of March 1996, the department had terminated all its African-American employees.

Discussion

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c). The burden is on the moving party to demonstrate that no genuine issue of material fact exists. *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). All ambiguities must be resolved and all inferences must be drawn in favor of the non-moving party. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985). When no rational jury could find in favor of the non-moving party because the evidence to support its case is so slight, there is no issue of material fact and a grant of summary judgment is proper. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988). A litigant may not defeat a motion for summary judgment solely through "unsupported assertions" or conjecture. *Goenaga v. March of Dimes Birth Defects Fund*, 51 F.3d 14, 18 (2d Cir. 1995).

A court must be especially cautious about granting summary judgment in a discrimination case in which the employer's intent is at issue. *Gallo v. Prudential Residential Services, L.P.*, 22 F.3d 1219, 1224 (2d Cir. 1994). "Because writings supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Id.*

Courts apply a three-stage test when evaluating race discrimination claims such as plaintiff's. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden

shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's discharge. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimintion. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Prima Facie Case

To establish a prima facie case of termination based on discrimination, plaintiff must show: (1) that she belonged to a protected class; (2) that her job performance was satisfactory; (3) that she was discharged; and (4) her discharge occurred under circumstances giving rise to an inference of discrimination on the basis of her membership in the protected class. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). The plaintiff's burden at the prima facie stage is *de minimis. Id.*

Plaintiff has unquestionably established the first and third elements of the prima facie case of discriminatory discharge. It is undisputed that plaintiff is African-American, and therefore a member of a protected class. It is also undisputed that plaintiff was discharged from her employment.

A question exists regarding whether plaintiff performed her job satisfactorily. In evaluating a plaintiff's job performance, the ultimate inquiry is whether her performance met her employer's legitimate expectations. *Meiri v. Dacon*,

759 F.2d 989, 995 (2d Cir. 1985). This will often be resolved through examination of the employer's evaluations of the plaintiff. *Knight v. Nassau County Civil Serv. Comm.*, 649 F.2d 157, 162 (2d Cir. 1981). At the time he informed plaintiff that she was being laid off, Schwartz told plaintiff that her work was good. Her personnel file is devoid of evidence of poor job performance. Plaintiff's periodic performance reviews were consistently satisfactory. Although defendant now asserts that plaintiff did not perform her work satisfactorily in certain respects, the Court will resolve the conflicts in favor of the plaintiff on this motion for summary judgment.

Finally, plaintiff must show that her termination occurred under circumstances that give rise to an inference of racism. Plaintiff urges the Court to infer racism from the following factual allegations: (1) plaintiff was the only one of the four employees laid off on January 24, 1996 who was asked to leave the premises immediately; (2) plaintiff's position was filled by a light-skinned Hispanic woman; (3) by the end of March 1996, plaintiff's department had terminated all of its African-American employees. Plaintiff also asks the Court to consider the allegedly discriminatory conduct that plaintiff endured on the job. Although the significance of these allegations is far from settled, it will be assumed for the purpose of this motion that they are enough to raise an inference of discrimination under the *de minimis* standard applied in discrimination cases.

Employer's Explanation

Once the plaintiff has established a prima facie case of discriminatory termination, the burden falls upon the

employer to produce evidence that the employee was terminated for a legitimate, non-discriminatory reason. *Burdine*, 450 U.S. at 254. The employer's explanation at this stage should be clear and specific enough to frame the factual issues with sufficient clarity to afford the employee a fair opportunity to demonstrate pretext. *Meiri*, 759 F.2d at 997-98.

A variety of conditions having nothing to do with the characteristics of the affected employees can force an employer into layoffs. In this case, budget constraints were responsible. Defendant argues that plaintiff was terminated as part of an ongoing reorganization of the MIS department in an effort to cut costs. Schwartz was directed by higher management to combine plaintiff's position with the other two positions. Defendant was forced by its budget difficulties to lay off a large number of employees, and these layoffs affected employees of all races. This effort to reduce costs was certainly a legitimate, non-discriminatory reason for terminating plaintiff.

Defendant also presents a legitimate, nondiscriminatory reason for choosing Martinez over plaintiff to fill the new combined position. Of the three employees whose positions were affected by this combination, Martinez was the most senior. Defendant is certainly entitled to consider seniority in its employment practices. Defendant also argues that Martinez had the unqualified endorsements of her supervisors, while Schwartz apparently had reservations about plaintiff's performance. These are also legitimate considerations of an employer in making employment decisions.

Plaintiff asserts that even after her pay cut, Martinez's salary was still $7,000 higher than plaintiff's. Plaintiff argues that if the layoffs were a sincere effort to cut costs, defendant should have taken the most cost-effective approach and chosen plaintiff to fill the new position because her salary was lower than Martinez's. This argument is without merit. Defendant is not required to ignore applicants' other qualifications merely because it is trying to save money. That defendant retained a particular person at a certain salary does not gainsay its contention that it was acting overall to save money. Indeed, the savings realized from the combination of the three positions was over $60,000 annually.

Pretext

Once the employer has met its burden of providing a legitimate, non-discriminatory reason for plaintiff's discharge, the plaintiff has an opportunity to show that the stated reasons were merely a pretext for discrimination. An employee may satisfy this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Plaintiff has not satisfied this Court that defendant's stated reasons for terminating her were pretextual. Much of plaintiff's argument that she was discriminated against is

based on her allegations of differential treatment. Plaintiff argues that she was treated differently from other employees in (1) the circumstances of her termination; (2) the treatment of her leave requests; (3) the dispensation of bonuses.

On the day of her termination, plaintiff was asked to leave the premises. Three other terminated employees were all allowed to stay at Sony, in some capacity or other, for a longer period of time. Plaintiff states that this is evidence of discrimination against her based on her race. The Court does not agree. Two of these, Gricus and Richards, were management level employees. Gricus and Richards signed the termination agreement and were asked to stay through March in order to transfer the more substantial duties of these executive-level employees to others. Bonet was an executive secretary like plaintiff. Bonet signed the termination agreement and accepted employment within the temp pool. The different treatment of these three employees had nothing to do with racial discrimination.

Plaintiff alleges that Schwartz treated her requests for leave time differently from the requests of other employees. She states that he questioned her extensively when she asked for time off, but he accepted simple e-mail notifications from other employees. Plaintiff stated that the following employees were permitted to notify Schwartz of time off via e-mail: William Marengo, an associate director, Mark Rheiner, a director, Susan Richards, a manager, and Doreen Moller, a manager. In any event, prior to the e-mail messages these employees had scheduled their time off with Schwartz at executive staff meetings. The e-mail messages were merely reminders to Schwartz about pre-arranged vacation days.

Appendix B

There is no merit in the claim that this e-mail procedure indicated racial discrimination against plaintiff.

Finally, plaintiff alleges that Schwartz did not give her a bonus for her work on a presentation. Plaintiff was involved in the planning and organization of a multi-media presentation that Schwartz gave in Geneva in 1995, that was a great success. Plaintiff expressed interest in receiving some recognition of her contributions, either in the form of a bonus or otherwise, but Schwartz declined to render any. Plaintiff and defendant disagree as to whether plaintiff's contributions to the presentation actually merited a bonus or any additional recognition. This Court is not in a position to determine the importance of plaintiff's contributions. However, even assuming that plaintiff made substantial contributions to the presentation, plaintiff's claim that she did not receive a bonus is not evidence of discrimination. Plaintiff points to two other employees, Rosemary Everett and Brady Scheiss, whom she believes received bonuses for their accomplishments. These two employees are not similarly situated to plaintiff in at least two regards: (1) they are both executive level employees, and (2) their accomplishments were of a different nature from those of plaintiff. In any event, these employees did not receive bonuses, although one was recommended for a bonus and the other was promoted sometime later. Plaintiff has not produced evidence that she was treated differently from other employees because of race.

Plaintiff makes several arguments in support of her claim that are not based on differential treatment. She claims that Schwartz did not follow company procedure regarding her performance review, that Schwartz said that she was not

"one of the boys," that she was stripped of any non-secretarial duties when she came to work for Schwartz, that Schwartz told her that she played her gospel music too loud, and that by the end of March 1996 her department was devoid of African-American employees. Of these, only the last raises even a question of discrimination.

A racial imbalance in the makeup of a workplace is insufficient, by itself, to demonstrate discrimination. It is unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 489 (1986) (O'Connor, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988).

In some circumstances, a plaintiff may use statistical evidence regarding an employer's practices to rebut an employer's purported legitimate non-discriminatory explanation for adverse employment action. However, the Supreme Court has outlined limitations on the use of racial statistics. First, plaintiffs are required to identify a specific employment practice, rather than rely on bottom line numbers in an employer's workforce. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). Plaintiffs must then present statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.*

Appendix B

Plaintiff has done no more than state that there are no longer any African-American employees in her department. She has not identified any specific employment practice that resulted in this situation. Moreover, this evidence is certainly not statistical evidence sufficient to show that African-Americans have been excluded based on race. Plaintiff does not state how many employees the department has. She has not performed an analysis of the imbalance, much less provided any evidence of its statistical significance. Therefore, plaintiff is incorrect in her assertion that the absence of African-Americans in her former department is evidence of discrimination.

Conclusion

Defendant has demonstrated that racial discrimination was not a factor in plaintiff's termination. There is no triable issue of fact.

Defendant's motion for summary judgment is granted and the action is dismissed.

SO ORDERED.

Dated: New York, New York

March 7, 2001

s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 31, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 01-7398

PHILLIS ROBINSON BRANCH,

Plaintiff-Appellant,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Defendant-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st Day of January, two thousand three.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellant, Phillis Robinson Branch.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED**.

Appendix C

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/ Arthur Heller
Arthur Heller,
Administrative Attorney